expressly impose on utilities the burden of proving that they are justified in denying access pursuant to section 224(f)(2)[.]"[37/]

In response to the Commission's first inquiry -- what specific reasons "if any" could justify denial, there are obviously reasons of safety, reliability, and generally applicable engineering purposes that would justify denial of access. A Commission regulation suggesting that there may be no such reasons would fly in the face of the express intent of Congress and render half of section 224(f)(2) without any effect. Thus, such a rule would violate the maxim of statutory interpretation that a statute should not be interpreted to be a nullity. Congress, in the statute, directly indicated that there are certainly reasons of safety, reliability, and generally applicable engineering purposes which would justify denial of access, and the Commission must give effect to the unambiguously expressed intent of Congress.[38/]

However, the Commission should not attempt to establish an all-inclusive list of "specific reasons" of safety, reliability, and generally applicable engineering purposes that would justify denial of access. There are numerous factual circumstances in which attachments might be sought, and each may present different "specific reasons" that might justify denial of access. Electric utilities have been in the business of providing reliable power for over a hundred years, and are constantly learning new and better ways to serve the public reliably. It is impossible to boil this experience into a simple and easily applicable laundry list. Reliability of the electric

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[37/] Id.

[38/] See Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

grid is not simple in concept or execution, but is the product of many power engineering factors. If one of those factors changes, other factors must be controlled to ensure reliability. As electrical distribution systems evolve, some current threats to reliability may be eliminated and more attachments could become possible. With the advent of competition at the wholesale level[39/] and numerous states considering competition at the retail level, reliability can no longer be maintained simply by overengineering the transmission and distribution systems or by requiring spinning reserve margins of 20% over current load or 5% over system seasonal peak load. In order to survive, much less prosper, utilities must engineer reliability more precisely and at minimal cost. If the FCC were to establish a fixed list of reliability factors in this proceeding, that rule might frustrate this overriding industry imperative.

The FCC should not attempt to legislate reliability standards by rule. Rather, a good compromise between the interests of the electric utility industry and the telecommunications industry would be to provide procedural safeguards rather than substantive engineering standards to ensure that a utility does not use reliability as a red herring to deny access. As perhaps contemplated in the NPRM, the utility may appropriately bear the burden of proof to establish that proposed attachments quantifiably threaten reliability. Duquesne is comfortable in bearing that burden because it has no intention of using reliability as an excuse to deny access and it is confident that its power engineers can credibly demonstrate which proposed attachments threaten reliability. However, once a utility demonstrates through an engineering analysis that proposed

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39/ See Promoting Wholesale Competition Through Open Access, Non-discriminatory Transmission Services by Public Utilities. Order No. 888, IV FERC Regs. & Stats.

attachments quantifiably threaten reliability, that engineering analysis should be considered a rebuttable presumption. Thus, once a utility has made a prima facie case, the burden should shift to the telecommunications carrier seeking the attachments in question to demonstrate that the utility's engineering analysis is incomplete or invalid, with the utility holding the ultimate burden of proof on the reliability issue.

Importantly, the NPRM recognizes that Section 224(f)(2) contemplates a prospective analysis (and that a quantifiable threat to reliability exists), constitutes sufficient cause under Section 224(f)(2) to deny access. Section 224(f)(2) does not contemplate that every proposed attachment must in the first instance be permitted, subject to removal if reliability is actually impaired.

D. The Commission Should Require Compliance with the National Electrical Safety Code and Structural Integrity As Important Safety Criteria

Certain safety factors justify denial of access. First, the Commission should recognize that utilities and carriers universally recognize that a violation of the National Electrical Safety Code (the "Code") requirements pertaining to distribution pole attachments constitutes a specific reason of safety that would justify denial of access. In this regard, the Commission should require that not only must a proposed attachment meet the theoretical requirements of the Code, but that the telecommunications carrier in practice must comply with this Code. A continuing problem is that cable television systems frequently use independent contractors rather than employees for service extensions. These contractors are of uneven qualifications, and it is not uncommon for some contractor personnel to make improper attachments in violation of the Code. The Commission's rule should recognize that repeated actual violations of the Code present a

specific safety threat justifying, at a minimum, an electric utility to require that attachments of violating carriers be made only by utility personnel or contractors approved by the utility (at the carrier's cost). If a violating carrier refuses to comply with the utility's reasonable request that it use only utility personnel or utility-approved contractors, the Commission's rules should permit the utility to deny access without regard to whether the proposed attachments, in theory, comply with the Code.

A second situation in which denial of access would be justified would be if the proposed attachment would exceed the maximum load (in either compression or shear) that the structure can support. This should be measured under the most severe environmental conditions (e.g., ice, wind, storms, etc.) by reference to the more stringent of the applicable engineering code or effective state regulations (such as the Wisconsin regulations cited above).

IV. COMMENTS REGARDING NOTICE AND PAYMENT FOR ADDITIONS OR MODIFICATIONS TO ATTACHMENTS

Section 224(h) requires that a utility give written notice to attaching entities of its intention to modify a facility so that the attaching entities will have reasonable opportunity to add to or modify their attachments, and requires that any entity that adds to or modifies its attachment must bear a proportionate share of the utility's make-ready costs. The NPRM seeks comments on the manner and timing of such notification (see Subpart IV.A below), how the "proportionate share" should be determined (see Subpart IV.B), whether such costs should be offset by potential increased revenues (see Subpart IV.C), and whether the Commission should impose "limitations on an owner's right to modify a facility and then collect a proportionate share of the costs of such

modification," perhaps by adopting rules that "limit an owner from making unnecessary or unduly burdensome modifications or specifications" (see Subpart IV.D).[40/]

A. The Commission Should Require Only Notice By Mail And Establish A 10-Day Notice Period With A Five-Year Grace Period For Database Validation

With regard to the manner of notice, the Commission should require notice only by first class mail, postage prepaid (or by any other means upon which the parties may mutually agree). Federal courts and agencies (including this Commission, see 47 C.F.R. § 1.47) require only first class mail for service of process unless the time for response is very short. Given the number of distribution poles, ducts, conduits, and rights-of-way in service, the number of notifications will be significant. A requirement for certified mail or other traceable delivery methods would impose a significant financial burden for little corresponding gain.

With regard to the timing of notice, for planned modifications, Duquesne would support a Commission rule to establish a reasonable advance notification period (a maximum of 10 days) before a proposed facility modification. The attaching entity's nonresponse within the 10-day notice period should be considered a negative response (i.e., that the carrier does not wish to add to or modify its attachment).

The rule should take into account four exceptional situations. First, emergency modifications must be excepted from the notice requirements. Electric utilities have a state-imposed duty to serve the public, and restoration of service must be made immediately. Second, because Section 224(h) addresses only existing attachments, utilities should be permitted, but not required, to

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[40/] NPRM ¶ 225.

provide notice when constructing new facilities. Depending upon the nature of the service requested by the new utility customer, the utility may be under a very short state-imposed deadline to provide that service, and waiting for 30 days (or even a shorter period) for telecommunications carriers to respond could place the utility in violation of state law.

Third, minor modifications which occur through routine maintenance actions should be excepted. The notification rule must be reasonably capable of execution, and inclusion of routine maintenance within its scope will render it unworkable.

Finally, as noted above, existing utility pole attachment databases are not entirely accurate. Because of the expense of maintaining and validating such databases and because there was no legal requirement to do so, some utilities have not had aggressive database development efforts. In many cases, telecommunications carriers have made attachments without notifying the utility that they have done so. For these reasons, the final rule should include a grace period (five years would be appropriate) for validation of pole attachment databases. During that grace period, utilities should not be precluded from modifying a facility without notice if its database shows no attachments to that facility, but when the field crews arrive to effect the modification, they find cable television or other attachments actually in existence. For the Commission at that point to require work be stopped for ten days will unnecessarily increase utility costs (which would be reflected in higher electricity rates) and place the utility in jeopardy of violating state utility service standards. In order to preclude future database accuracy problems, the final rule should prohibit telecommunications carriers from making any attachments without first obtaining the facility owner's concurrence. Five years is an appropriate grace period because it is only at

that point that database costs will be recoverable through increased rents due to the phase-in scheme in Section 224(e)(4).

B. "Proportionate Costs" Should Be Determined By Dividing the Make-Ready Costs By the Number of Attaching Entities (Including The Utility) That Elect To Add To Or Modify Their Attachments

The Commission seeks comments on "whether to establish rules to determine the 'proportionate share' of the costs to be borne by each entity, and, if so, how such a determination should be made." NPRM ¶ 225. Given that Section 224 establishes the principle that rates should only be set by the FCC if the parties fail to resolve a dispute over charges,[41/] the Commission's rule, should it elect to adopt one, should only establish the meaning of "proportionate share" if the parties are unable to agree because the "make-ready" costs are a type of "charge."

With respect to how a proportionate share of make-ready costs should be calculated, the only workable solution is that the make-ready costs be divided equally among the entities (including the utility, if applicable) which elect to add to or modify their attachments. This is consistent with the method that Congress enacted to divide the cost of unusable space on a pole (see Section 224(e)(2)). Any other system would be an accounting nightmare when multiplied by the millions of poles and other facilities in existence. The accounting costs for maintaining a more complex system for determining such costs would ultimately be reflected in increased rents for all entities with attachments because it would significantly increase costs. Keeping the solution simple is in the best interests of telecommunications carriers as well as utilities because the Commission's final rule must be capable of reasonable execution.

[41/] See Section 224(e)(1).

C. Make-Ready Proportionate Costs Should Not Be Offset By Potential Revenue Increases To The Owner

The Commission requests comments on whether payment of proportionate share of "make-ready" costs should be offset by potential increases in revenue to the owner due to additional attachments. NPRM ¶ 225.

Duquesne urges the Commission not to adopt such a rule. First, to offset payment of a proportionate share of make-ready costs by potential (rather than actual) revenue increases would be unfair and unjust. Under Section 224(h), an entity with an existing attachment bears no make-ready cost if it does not elect to add to or modify its attachment. The clear intention of Section 224(h) is that the attaching entities which benefit from the facility owner's modification (including the owner) must bear the financial burden of the modification which makes those benefits possible. Offsetting those costs with actual revenue increases would effect a material change in the compensation scheme mandated by Congress. Offsetting those costs with potential revenue increases would utterly disregard the clearly-expressed intent of Congress by shifting this cost entirely to the facility owner. In addition, the Commission cannot lift (and materially modify) one section of a comprehensive rate regulation scheme enacted by Congress. This scheme as a whole was enacted -- including the very burdensome provisions of Section 224(i) which require a utility to pay for all rearrangements of a carrier's attachments except those which directly benefit the attaching entity. The compensation scheme was the result of the usual legislative give-and-take. Duquesne respectfully submits that the Commission should not attempt to amend the statutory language in the manner suggested by its request for comments.

D. The Commission Should Not Restrict The Facility Owner's Right To Modify Its Facilities

The Commission seeks comment on whether to limit owners from making "unnecessary or unduly burdensome modifications." NPRM ¶ 225. The Commission should not do so.

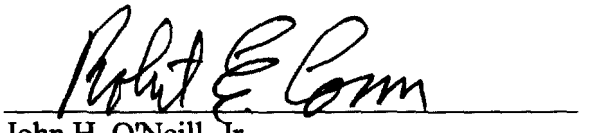
First, it will be difficult, if not impossible, for the Commission to establish a rule that fairly defines what modifications are "unnecessary or unduly burdensome." What might be unnecessary or unduly burdensome from the standpoint of a cable television operator might be absolutely necessary from the standpoint of the electric utility. The Commission should not wade into this morass. Moreover, the Congress already considered the interests that would be protected by such a limitation. If a utility seeks to modify a facility and the attaching carrier will not benefit from the modification, the attaching entity bears none of the costs associated with the modification. Given the large costs associated with such rearrangements, which can reach millions of dollars, this allocation of rearrangement costs will certainly preclude utilities from making any "unnecessary or unduly burdensome" modifications. Further Commission regulation is unnecessary

V. CONCLUSION

For the foregoing reasons, the Commission initially should proceed by adjudication rather than by rulemaking in deciding issues relating to nondiscriminatory access to poles, ducts, conduits, and rights-of-way and should take into account the suggestions proposed in these comments.

Respectfully submitted,

DUQUESNE LIGHT COMPANY

By: 

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May 20, 1996

309544-01 / DOCSDC1

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